

1 Honorable Barbara J. Rothstein
2
3
4
5
6

7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 ANNA NEMYKINA, for Herself, as a
11 Private Attorney General, and/or On Behalf
12 Of All Others Similarly Situated,
13 Plaintiff,
14 v.
15 OLD NAVY, LLC; OLD NAVY
16 (APPAREL), LLC; OLD NAVY
17 HOLDINGS, LLC; GPS SERVICES, INC.;
18 THE GAP, INC.; and DOES 1-20,
19 inclusive,
20 Defendant.

21 No.: 2:19-cv-01958 BJR

22 ORDER DENYING DEFENDANTS'
23 MOTION TO DISMISS

24 I. INTRODUCTION

25 Plaintiff Anna Nemykina brings this putative class action lawsuit against Defendants
26 Old Navy, LLC, Old Navy (Apparel), LLC, Old Navy Holdings, LLC, GPS Services, Inc., and
The Gap, Inc. (“Old Navy” or, collectively, “Defendants”), asserting several causes of action
under California and Washington law. She has claimed that Defendants engage in a deceptive
practice of advertising items at a claimed “discount” or sale price, when in reality many of
those items are “rarely if ever” offered at a higher original price, and that she purchased a
number of items in reliance on these representations.

This order pertains to Defendants’ Motion to Dismiss all claims. In her Response,
Plaintiff concedes California law does not apply and consents to dismissal of all California

1 claims, leaving only her two Washington claims, brought under the Washington Consumer
 2 Protection Act, RCW 19.86.010 *et seq.* (“CPA”). In their Motion, Defendants argue that
 3 Plaintiff’s CPA claims should be dismissed because the heightened standard for pleading fraud
 4 with particularity applies, and Plaintiff’s allegations lack the requisite specificity. Defendants
 5 also argue that Plaintiff’s request for restitutionary and injunctive relief under the CPA should
 6 be dismissed, arguing these equitable remedies are not available under the facts alleged.

7 The Court has reviewed the parties’ briefs and the Complaint, and the relevant case law,
 8 and denies Defendants’ Motion to Dismiss for the following reasons.

9 **II. FACTUAL BACKGROUND**

10 Plaintiff Anna Nemykina alleges that on December 1, 2016, she visited the Old Navy
 11 website to shop for Christmas presents. First Am. Compl. (“FAC”), Dkt. No. 14, ¶ 51. She
 12 claims that “[n]early all of the products she viewed [on the website] were advertised as being
 13 discounted from a reference price.” FAC ¶51.¹ Based on these representations, she claims she
 14 “reasonably believed that the clothing items were normally offered and sold by Old Navy at the
 15 higher advertised list prices” and “that the products were worth, and had a value of, the higher
 16 stated reference prices.” Believing she was receiving a “special bargain,” she purchased 21
 17 items. *Id.* ¶ 52. According to subsequent investigation of her counsel, however, and
 18 unbeknownst to Plaintiff at the time of her purchases, Defendants “rarely or never” offer their
 19 products for sale at the higher reference price. This “false discounting scheme” harmed the
 20 Plaintiff, she claims, by inducing her to “pay more than she otherwise would have paid and to
 21 buy more than she otherwise would have bought.” *Id.* ¶¶ 32, 59.

22 Plaintiff’s claims are brought on behalf of herself and “[a]ll residents of the State of
 23 Washington who, within the applicable limitations period, purchased from the Old Navy
 24

25 ¹ The parties use the phrase “reference price” to mean the higher original or regular price at which an item is
 26 offered for sale, in reference to which a discount price is calculated (*e.g.* the sale price may be 30% off the original
 reference price).

1 website one or more products which was advertised or promoted by displaying or
 2 disseminating a reference price or discount.” *Id.* ¶ 65. She seeks damages, restitution, attorneys’
 3 fees, and a permanent injunction, enjoining Defendants from “advertising false reference prices
 4 and/or false discounts.” *Id.* ¶¶ 159-60.

5 III. DISCUSSION

6 A. Standard on a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss

7 Upon a motion by a defendant, dismissal is appropriate if the complaint does not “state
 8 a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). The complaint must
 9 “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on
 10 its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic v. Twombly*, 550 U.S. 544,
 11 570 (2007). A claim has “facial plausibility” when the party seeking relief “pleads factual
 12 content that allows the court to draw the reasonable inference that the defendant is liable for the
 13 misconduct alleged.” *Id.* On a motion to dismiss under Rule 12(b)(6), the Court will accept all
 14 of plaintiff’s plausible allegations as true and construe them in the light most favorable to the
 15 plaintiff. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009).

16 B. Washington Consumer Protection Act Claims

17 1. Plaintiff Must Plead Her CPA Claims Sounding in Fraud with the Specificity 18 Required Under Fed. R. Civ. P. 9(b)

19 Defendants seek dismissal of Counts I and II of the Complaint brought under the CPA,
 20 arguing they fail to meet the heightened pleading standard of Fed. R. Civ. P. 9(b). That rule
 21 provides that “a party must state with particularity the circumstances constituting fraud.” Thus
 22 the first question raised by the motion is whether this standard—or the more lenient standard
 23 under Rule 8(a)(2) requiring only a “short and plain statement of the claim”—applies to
 24 Plaintiff’s CPA claims.

25 While not all claims brought under the Washington CPA must be pled with the
 26 specificity prescribed by Rule 9(b), CPA claims that allege and depend upon a “unified course

1 of fraudulent conduct” as the basis of the claims “sound in fraud,” and must be averred with
 2 particularity. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003) (“In
 3 some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on
 4 that course of conduct as the basis of a claim. In that event, the claim is said to be “grounded in
 5 fraud” or to “sound in fraud,” and the pleading of that claim as a whole must satisfy the
 6 particularity requirement of Rule 9(b).”); *Vernon v. Qwest Commc'n's Int'l, Inc.*, 643 F. Supp.
 7 2d 1256, 1265 (W.D. Wash. 2009) (Rule 9(b) may apply to CPA claims containing “allegations
 8 of either an intent to deceive or an overarching fraudulent scheme.”).

9 Here, Plaintiff repeatedly invokes claims of fraud, and states that Defendants’ pricing
 10 was an “overarching fraudulent scheme” that Defendants employed as part of a “marketing
 11 plan.” *See, e.g.*, FAC ¶ 4 (alleging that “Old Navy’s nationwide fraudulent advertising scheme
 12 harms consumers like Plaintiff Anna Nemykina”); *id.* ¶ 83 (“Defendants’ false reference
 13 pricing scheme fraudulently increased demand from consumers, enabling Defendants to charge
 14 higher prices than they otherwise could have charged.”); *id.* ¶ 85 (“The unlawful acts and
 15 omissions pled herein were, are, and continue to be part of a pattern or generalized course of
 16 conduct.”). Plaintiff’s claims rely entirely on these allegations of a “unified course of
 17 fraudulent conduct,” and therefore are subject to Rule 9(b)’s heightened particularity
 18 requirement. *Vess*, 317 F.3d at 1103–04.

19 Moreover, Plaintiff is not merely claiming that Defendants engaged in an act that had a
 20 capacity to deceive (which presumably would not require pleading with heightened
 21 specificity); Plaintiff here repeatedly accuses Defendants of having the *knowledge* and *intent* to
 22 deceive their customers, inducing those customers into buying and paying more for their goods
 23 than they otherwise would have. *See* FAC ¶ 104 (“The unlawful methods, acts or practices
 24 alleged herein to have been undertaken by Old Navy were all committed intentionally.”); *id.* ¶
 25 123 (“Old Navy, with intent directly or indirectly to dispose of personal property . . . or to
 26 induce the public to enter into any obligation relating thereto, makes . . . statements concerning

1 that personal property . . . which are untrue or misleading and which are known (or which by
 2 the exercise of reasonable care should be known) to be untrue or misleading.”). This case is
 3 thus distinguishable from *Grigsby*, the case on which Plaintiff relies, in which Rule 9(b) did not
 4 apply because the plaintiff’s CPA claim did not aver the defendant’s intent to deceive. *See*
 5 *Grigsby v. Valve Corp.*, 2013 WL 12310666, at *3 (W.D. Wash. Mar. 18, 2013), quoting
 6 *Vernon*, 643 F. Supp. 2d at 1265 (“Although fraud or intentional misrepresentation may be ‘one
 7 of the many possible unfair or deceptive acts for which a consumer may seek relief under
 8 consumer protection statutes,’” Rule 9(b) does not apply when the plaintiff “has not alleged
 9 fraud as an element of his WCPA claim or ‘grounded’ his WCPA claim in fraud.”). Rule 9(b)
 10 therefore applies to Plaintiff’s CPA claims sounding in fraud.

11 2. *Plaintiff’s Allegations Are Sufficiently Specific*

12 Having determined that Plaintiff must plead her fraud-based CPA claims with
 13 heightened specificity, the Court next evaluates whether Plaintiff here has done so. The
 14 standard under Rule 9(b) is that fraud allegations must “be specific enough to give defendants
 15 notice of the particular misconduct . . . so that they can defend against the charge and not just
 16 deny that they have done anything wrong. . . . Averments of fraud must be accompanied by ‘the
 17 who, what, when, where, and how’ of the misconduct charged.” *Kearns v. Ford Motor Co.*, 567
 18 F.3d 1120, 1124 (9th Cir.2004) (citations omitted). The purpose of Rule 9(b) is “(1) to provide
 19 defendants with adequate notice to allow them to defend the charge and deter plaintiffs from
 20 the filing of complaints as a pretext for the discovery of unknown wrongs; (2) to protect those
 21 whose reputation would be harmed as a result of being subject to fraud charges; and (3) to
 22 prohibit plaintiffs from unilaterally imposing upon the court, the parties and society enormous
 23 social and economic costs absent some factual basis.” *Id.* at 1125.

24 Defendants challenge the sufficiency of allegations relating to two elements of
 25 Plaintiff’s CPA claim, arguing Plaintiff has failed to allege sufficient details related to both the
 26

1 alleged (1) unfair or deceptive practices, and (2) injury to property.² The Court finds that
 2 Plaintiff has sufficiently pled the “who, what, when, where, and how” required under Rule 9(b),
 3 giving Defendants “adequate notice to allow them to defend the charge.” *Kearns*, 567 F.3d at
 4 1125. The Court addresses each of the two elements in turn.

5 *a. Plaintiff Has Alleged Unfair or Deceptive Practices With Sufficient Particularity*

6 Defendants complain generally that Plaintiff has failed to allege specific facts

7 supporting a primary element of the CPA: that Defendants engaged in an unfair or deceptive
 8 act. Ultimately, however, they point to only a few aspects of Plaintiff’s allegations that they
 9 claim are too vague and require more detail. First, Defendants argue that Plaintiff’s allegations
 10 are insufficient because she “does not provide any evidence regarding what the supposed
 11 references prices were” of any of the 21 items she claims to have purchased. Mot. at 13. As an
 12 initial matter, a plaintiff is not required to proffer evidence at the pleading stage, even for fraud;
 13 plausible allegations will suffice. *Bell Atl. Corp. v. Twombly*, 550 U.S. at 556. Furthermore,
 14 Plaintiff has clearly alleged that the reference prices were higher than the claimed sale prices
 15 she paid, and that Defendants represented to her that she had saved a total of 24.5% off the
 16 original prices. Ex. A to FAC. The exact dollar amount of the 21 reference prices is not critical
 17 to understanding her claims, and furthermore is a simple, discrete fact most certainly in
 18 Defendants’ possession, easily discoverable. No further specificity is required to enable
 19 Defendants to make a meaningful denial.

20 Second, Defendants argue that Plaintiff does not allege what about the reference prices
 21 was “false or misleading,” or “how those supposed references prices were worded such that one
 22 would assume they mean what she vaguely claims she understood them to mean.” Mot. at 3.
 23 This argument borders on frivolous. Plaintiff clearly and at length alleges that “Old Navy’s
 24

25 ² To establish a claim under the CPA, a plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring
 26 in the conduct of trade or commerce, (3) that impacted the public interest, (4) causing injury to plaintiff’s business
 or property, and (5) a causal link between the unfair or deceptive act or practice and the injury. See *Hangman
 Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 784–93 (1986).

1 discounts and reference prices are false, because Old Navy rarely if ever offers the products at
2 the advertised list price.” FAC ¶ 3. Plaintiff goes on to elaborate: “Old Navy invents inflated
3 and fictitious list prices in order to enable it to advertise perpetual website-wide and store-wide
4 “sale” events and product discounts to induce customers to purchase its products. Old Navy’s
5 marketing plan is to trick its customers into believing that its products are worth, and have a
6 value equal to, the inflated list price, and that the lower advertised sale price represents a
7 special bargain—when in reality and unbeknownst to the customer, the “sale” price is
8 approximately equal to Old Navy’s usual and normal selling price for the product.” FAC ¶ 3.
9 Whether the reference prices were worded as “original” or “regular” is not critical to
10 Defendants’ ability to investigate Plaintiff’s allegations relating to the claim that the pricing
11 was misleading and, if appropriate, deny them. While most of the allegations in the Complaint
12 are not made in direct reference to Plaintiff’s discrete purchase of 21 items, but to Defendants’
13 store-wide pricing practices more generally, Plaintiff’s allegation that those practices are
14 pervasive (if not ubiquitous) easily raises the inference that the practices also relate to her
15 specific purchase.

16 Finally, Defendants argue vaguely that Plaintiff fails to allege “any statement made by
17 Defendants that was untrue or misleading.” Mot. at 13. Again, however, it is abundantly clear
18 that the “statements” that Plaintiff is claiming Defendants made were that the items she
19 purchased were originally offered for sale at a higher price, and were now being offered to her
20 at a discount, and that this representation was false and misleading. *See, e.g.*, FAC ¶ 3 (“Old
21 Navy’s discounts and reference prices are false, because Old Navy rarely if ever offers the
22 products at the advertised list price”); *id.* ¶ 4 (Defendants’ “products are not in fact worth the
23 inflated amount that Old Navy represents to [customers]” represented by the purported original
24 list price). Furthermore, Plaintiff has specifically alleged she observed and relied on the pricing
25 representations. FAC ¶ 51. (“While browsing the website, Ms. Nemykina saw prominent
26 advertising that Old Navy was offering significant “savings” throughout its website. . . . Nearly

1 all of the products she viewed were advertised as being discounted from a reference price.
 2 [Ms.] Nemykina viewed a strike-through reference price for the items, alongside a lower “sale”
 3 price.”). It is not apparent what additional detail or clarity Defendants could be demanding,
 4 particularly at this early stage of the proceedings. Plaintiff has provided sufficient detail
 5 regarding the alleged unfair or deceptive practices to enable Defendants to investigate her
 6 allegations and, to the extent appropriate, deny them.

7 *b. Plaintiff Has Alleged Her Injury With Sufficient Particularity*

8 Old Navy also argues that Plaintiff’s Complaint fails to meet the heightened pleading
 9 standard regarding her claimed injury—one of the elements of her CPA claim—because
 10 “Plaintiff does not allege that she would not have made the purchases” had Defendant not
 11 misrepresented the items’ value. Mot. at 14.

12 This argument lacks merit as well. Plaintiff has alleged that “[t]he clothing items she
 13 purchased were not in fact worth the list prices that Old Navy had led her to believe. Contrary
 14 to Old Navy’s representations, Ms. Nemykina did not receive any deal at all.” FAC ¶ 54.
 15 Furthermore, while stated somewhat equivocally, Plaintiff in fact explicitly alleges that if she
 16 “had known the truth,” *i.e.* that the items had never or rarely been offered at the higher
 17 “original” price, “she would have acted differently and/or would not have purchased the
 18 products from Old Navy.” FAC ¶ 56.³ She plainly alleges her injury: “Old Navy’s false
 19 advertising harmed Ms. Nemykina by causing her to pay more than she otherwise would have
 20 paid and to buy more than she otherwise would have bought.” *Id.* ¶ 59. Inducing a plaintiff into
 21 spending money she otherwise would not have spent, based on a misrepresentation, is clearly a

22

23

24 ³ Defendants may be right that evidence merely that Plaintiff would have “acted differently,” without more, would
 25 ultimately not establish a cognizable injury. For purposes of evaluating the merits of the motion to dismiss,
 26 however, the Court is bound to resolve the ambiguity in this phrasing in Plaintiff’s favor, and interprets the
 allegation as Plaintiff claiming she would not have purchased some or all the items at the prices she paid had she
 known they had not been offered at the higher price.

1 cognizable injury, which even under Rule 9(b) Plaintiff has sufficiently pled to survive a
2 motion to dismiss.

3 3. *Availability of Equitable Remedy*

4 Defendants seek dismissal of Plaintiff's request for equitable remedies. The equitable
5 remedies Plaintiff seeks as outlined in the Complaint include (1) "a public injunction enjoining
6 Defendants from advertising false reference prices and/or false discounts;" (2) "disgorgement
7 or restitution, including, without limitation, disgorgement of all revenues, profits and/or unjust
8 enrichment that each Defendant obtained, directly or indirectly, from Plaintiff and the members
9 of the Class or otherwise as a result of the unlawful conduct alleged herein;" and (3)
10 "restitution to Plaintiff and the Class in an amount to be proven at trial." FAC ¶ 160.

11 In their opening brief, Defendants make three arguments, which the Court addresses in
12 turn. First, Defendants argue that "Plaintiff's claims for a restitutive remedy fail because
13 Plaintiff alleges no facts that the clothing she purchased was worth less than what she paid."
14 Mot. at 15. This is not, however, sufficient reason to dismiss Plaintiff's claim for restitution,
15 which is available even where a plaintiff has not suffered a loss, if a defendant has wrongfully
16 gained a benefit. *See Restatement (First) of Restitution § 1 (1937)*(where "a benefit has been
17 received by the defendant but the plaintiff has not suffered a corresponding loss or, in some
18 cases, any loss, but nevertheless the enrichment of the defendant would be unjust . . . the
19 defendant may be under a duty to give to the plaintiff the amount by which he has been
20 enriched."). As discussed above, Plaintiff alleges that she was induced to purchase more than
21 she would have, and at a higher price, in reliance on Defendants' alleged misrepresentations.
22 To the extent she is able to prove these allegations, she may be entitled to restitution of the
23 amounts unlawfully gotten by these misrepresentations.

24 Second, Defendants argue that "Plaintiff does not have Article III standing to pursue
25 injunctive relief because she cannot allege imminent future harm." Mot. at 15. Defendants are
26 essentially arguing that since Plaintiff is now aware of their pricing practices, she is not at risk

1 of being fooled in the future. Mot. at 16 (“Plaintiff remains fully aware of Defendants’
 2 purportedly wrongful conduct so that she is no longer realistically threatened by a repetition of
 3 the alleged violation.”). The Ninth Circuit has squarely rejected this argument. *See Davidson v.*
 4 *Kimberly-Clark Corp.*, 889 F.3d 956, 969 (9th Cir. 2018) (“We hold that a previously deceived
 5 consumer may have standing to seek an injunction against false advertising or labeling, even
 6 though the consumer now knows or suspects that the advertising was false at the time of the
 7 original purchase, because the consumer may suffer an ‘actual and imminent, not conjectural or
 8 hypothetical’ threat of future harm.”). The future harm from which Plaintiff seeks protection is
 9 not being deceived; it is being unable to rely on honest pricing practices. *See* FAC ¶ 62
 10 (alleging “Ms. Nemykina will be harmed if, in the future, she is left to guess as to whether Old
 11 Navy is providing a legitimate sale or not”); *see Davidson*, 889 F.3d at 970 (“[T]he threat of
 12 future harm may be the consumer’s plausible allegations that she will be unable to rely on the
 13 product’s advertising or labeling in the future, and so will not purchase the product although she
 14 would like to.”).

15 Finally, Defendants argue that Plaintiff’s claims for equitable relief under the CPA
 16 should be dismissed “because she may have an adequate remedy at law and her claims for
 17 equitable relief rely on the same facts as would any claims for legal relief.” Mot. at 16. This
 18 argument fails because, as Plaintiff points out, the statute itself provides that legal and
 19 injunctive remedies may be available simultaneously. *See* RCW 19.86.090 (“Any person who
 20 is injured in his or her business or property by a violation of [the CPA] . . . may bring a civil
 21 action in superior court to enjoin further violations, to recover the actual damages sustained by
 22 him or her, or both, together with the costs of the suit, including a reasonable attorney’s fee.”).

23 For the foregoing reasons, the Court denies Defendants’ request to dismiss Plaintiff’s
 24 request for injunctive relief.

25
 26

IV. CONCLUSION

2 Plaintiff has included in her Complaint allegations sufficient to withstand Defendants'
3 Motion to Dismiss, which therefore is hereby DENIED.

DATED this 15th day of May, 2020.

Barbara Rothstein

Barbara Jacobs Rothstein
U.S. District Court Judge